NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK
FEB 26 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

PRISCILLA G., JONATHAN S., and GILA RIVER INDIAN COMMUNITY, Appellants, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, NATHANIEL S.-M., and NATALIE S.-M., Appellees.	2 CA-JV 2009-0083 2 CA-JV 2009-0085 2 CA-JV 2009-0086 (Consolidated) DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 185962

Honorable Hector E. Campoy, Judge

AFFIRMED

Suzanne Laursen — Tucson
Attorney for Appellant Priscilla G.

Thea M. Gilbert — Tucson
Attorney for Appellant Jonathan S.

Laurie Kalivas-Gibney — Sacaton
Attorney for Gila River Indian Community

Terry Goddard, Arizona Attorney General
By Dawn R. Williams — Tucson
Attorneys for Appellee Arizona Department of Economic Security

E C K E R S T R O M, Presiding Judge.

¶1 Nathaniel S.-M., born in 2005, and Natalie S.-M., born in 2006, are the children of Priscilla G., a member of the Gila River Indian Community (the Community), and Jonathan S., a member of the Tohono O'odham Nation (the Nation). In this dependency matter, Priscilla, joined by Jonathan and the Community, challenges the juvenile court's orders dated July 16 and 29, 2009, denying the Community's motion to place the children with an Indian family and Priscilla's motion to transfer the matter to the Community tribal court.[1] For the reasons set forth below, we affirm.

¶2 It is undisputed that Nathaniel and Natalie are Indian children and that these proceedings are subject to the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901 through 1963. We examine de novo the meaning and application of the relevant provisions of ICWA, but review the juvenile court's denial of the underlying motions for an abuse of discretion. *See Michael J., Jr. v. Michael J., Sr.*, 198 Ariz. 154, ¶ 7, 7 P.3d 960, 962 (App. 2000); *In re Maricopa County Juv. Action No. JS-8287*, 171 Ariz. 104, 107, 828 P.2d 1245, 1248 (App. 1991).

[1]The denial of a motion to transfer is a final and appealable order, *In re Maricopa County Juv. Action No. JD-6982*, 186 Ariz. 354, 356 n.3, 922 P.2d 319, 321 n.3 (App. 1996), as is an order ratifying or changing a child's placement during dependency. *Lindsey M. v. Ariz. Dep't of Econ. Sec.*, 212 Ariz. 43, ¶ 9, 127 P.3d 59, 61-62 (App. 2006).

FACTUAL AND PROCEDURAL BACKGROUND

¶3 In March 2008, the Arizona Department of Economic Security (ADES) removed Nathaniel and Natalie from the home of a paternal relative and filed a dependency petition alleging that Priscilla had no contact with the children for more than one year; the children had been living with family members in a home where drugs were sold and were accessible to them; and the children suffered from medical conditions, including untreated head lice. Shortly after ADES provided the Community and the Nation with the required notice of the proceedings, both tribes successfully moved to intervene. *See* 25 U.S.C. §§ 1911(c), 1912(a). Jonathan, who was incarcerated during the dependency, entered a denial but submitted to the dependency petition, and the children were adjudicated dependent as to him in April 2008. Priscilla later admitted the children were dependent, and the juvenile court adjudicated them dependent as to her in June 2008. The parents were provided with various services to further the case-plan goal of family reunification, the sufficiency of which is not at issue on appeal.

¶4 The children were initially placed at Casa de los Niños, a shelter placement. At an April 2008 settlement conference, the Community agreed that there was good cause to deviate from ICWA's placement preferences as provided in 25 U.S.C. § 1915(b),[2] because

---

[2]25 U.S.C. § 1915(b), "Foster care or preadoptive placements; criteria; preferences," provides, in relevant part:

> Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable

ADES and the Community had been unable to locate an ICWA-compliant placement. Also in April 2008, Priscilla indicated that she "may seek to transfer jurisdiction to the Tribal Court," although she did not do so until fifteen months later, in July 2009. And, as of June 2008, none of the parties had been able to locate an ICWA-compliant home. Consequently, the juvenile court found continuing good cause to deviate from ICWA's placement requirements and permitted the children to be placed in the foster home they remained in throughout the dependency.

¶5 At a September 2008 dependency review hearing, both tribes agreed there was good cause to deviate from ICWA's placement requirements, and the court ordered that ADES continue to search for a compliant placement. In November 2008, after the Nation withdrew its request for placement with a paternal aunt, the juvenile court again found reason to deviate from ICWA's placement preferences. At that same hearing, Priscilla expressed

---

> proximity to his or her home . . . . In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—
>
> (i) a member of the Indian child's extended family;
>
> (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
>
> (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
>
> (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

her preference that the children be enrolled through the Nation, and the court thus granted the Community's motion to withdraw. However, based on the record before us, that enrollment never occurred, and the Community successfully moved to re-intervene in March 2009.

¶6 At a permanency planning hearing in March 2009, the court changed the case-plan goal to severance and adoption and ordered ADES to file a motion for termination, which it did on March 23, 2009. The court again found good cause to deviate from ICWA's placement preferences. One month later, on April 24, 2009, the Community provided notice that the children had been enrolled with the Community on April 15, 2009, more than one year after the dependency proceeding had commenced. At the April 29, 2009 initial severance hearing, the court set a placement hearing for July 16 to address the Community's proposed Indian placement, which it had reported for the first time that day, and also set the first day of the contested severance hearing for July 29.

¶7 On May 14, the Community filed a motion for placement with W. and G., a different family than the one it had proposed at the April 29 hearing. On July 1, shortly before the July 16 placement hearing, Priscilla filed for the first time a motion to transfer the dependency matter to the Community's tribal court. Although the placement hearing proceeded as scheduled on July 16, the court did not hear the contested motion to transfer until July 29, the first day of the severance hearing. The juvenile court denied the motion to change placement and the motion to transfer, and these consolidated appeals followed.

MOTION TO CHANGE PLACEMENT

¶8 Citing the ICWA preference that, "in the absence of good cause to the contrary," an Indian child shall be placed in "a foster home licensed, approved, or specified by the Indian child's tribe," 25 U.S.C. § 1915(b)(ii), the parents and the Community argue that the juvenile court did not adhere to ICWA when it refused to place the children with W. and G. As the operative language of § 1915 makes clear, in the absence of good cause to the contrary, the Act mandates placement in a home "licensed, approved, or specified" by the Community. Here, the juvenile court found that W., a member of the Community, and G., a member of the San Carlos Apache Tribe, provided an appropriate, ICWA-compliant home.

¶9 At the conclusion of the placement hearing, the court explained:

> Had this motion been brought earlier, had it been made at the time of the removal of the children, there is no doubt how I would have ruled. So timing is everything in this particular case. And if I didn't think I was harming the children in removing them at this point, I would return them to the Tribe indirectly by putting them in the ICWA compliant, non-relative, non-licensed Community approved placement.

The court further noted that the proposed placement with W. and G. was "appropriate and would be able to meet the needs of a child placed into its custody," and that it "would ensure a link and promote the heritage of the children with the people of [the] . . . Community, that would no doubt also further their interest in their connection to the . . . Nation." However, the court also found that the following factors constituted good cause to deviate from ICWA's placement preferences: the placement was in a different county (Maricopa) than the children's current residence; W. and G. were strangers to the children; and the children were

bonded with their current foster family, with whom they had lived for thirteen months. The court thus ruled:

> I am going to deviate from the ICWA placement requirements. I am going to affirm the [current] placement based on the harm that would befall the children in removing [them] two weeks prior to the termination [hearing], before a permanency decision has been made to virtual strangers. And again, it has nothing to do with the two women who are willing to take these children, but they are, in fact, strangers. I think they would be capable. They would be able.

¶10 "Once it is determined that a dependency proceeding involves an Indian child, the judge *must*, in the absence of good cause to the contrary, follow the provisions of the Act." *In re Coconino County Juv. Action No. J-10175*, 153 Ariz. 346, 349, 736 P.2d 829, 832 (App. 1987). In the absence of good cause to the contrary, a court's failure to apply ICWA's placement preferences constitutes an abuse of discretion. *Id.* The question before us, therefore, is whether the juvenile court abused its discretion when it found there was good cause to deviate from ICWA's placement preferences.

¶11 We first look to the interpretive guidelines drafted by the Bureau of Indian Affairs (BIA) for guidance in interpreting ICWA. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979). Although the Guidelines are not binding, *see* 44 Fed. Reg. at 67,584, Arizona courts have found them instructive in interpreting and applying ICWA. *E.g.*, *Steven H. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 566, ¶ 24, 190 P.3d 180, 186 (2008). Guideline F.3, "Good Cause to Modify [Foster Care or Preadoptive Placement] Preferences" provides:

> (a) For purposes of foster care, preadoptive or adoptive placement, a determination of good cause not to follow the order of preference set out above [in guidelines interpreting 25 U.S.C. § 1915(b)] shall be based on one or more of the following considerations:
>
> (i) The request of the biological parents or the child when the child is of sufficient age.
>
> (ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.
>
> (iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.
>
> (b) The burden of establishing the existence of good cause not to follow the order of preferences established in [§ 1915] subsection (b) shall be on the party urging that the preferences not be followed.

44 Fed. Reg. at 67,594. In addition, Congress declared that the purpose for creating ICWA is "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families" by ensuring "the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture." 25 U.S.C. § 1902.

¶12 The parents and the Community correctly argue that none of the three conditions asserted in Guideline F.3 as good cause to deviate from ICWA's placement preferences exists here: (1) the parents did not request that the juvenile court deviate from the Act, nor are the children of sufficient age to make such a request on their own; (2) there was no expert testimony that the children have extraordinary physical or emotional needs requiring such a deviation; and (3) based on the court's own determination, a suitable Indian

family was available for placement. *See* 44 Fed. Reg. at 67,594. But, because the Guidelines are non-binding and advisory in nature, this does not end our inquiry.

¶13 Here, the juvenile court heard evidence from the children's case worker that the children had become bonded with their foster family, with whom they had resided for thirteen months; that they displayed affection for their foster parents, whom they called "mommy" and "daddy"; and that removing the children would therefore be "very detrimental to . . . [and] emotionally hard on" them. As noted, the court thereafter acknowledged the suitability of the ICWA-compliant placement option, but found that the harm to the children in relocating them—given that they had bonded with the foster family—constituted good cause to deviate from the presumption in favor of that placement.

¶14 As our dissenting colleague correctly observes, the juvenile court's order also expressly placed weight on the "timing" of the Community's placement motion in denying that motion—a factor which, if motivated by the mere goal of administrative regularity, would not constitute good cause. But, when read in context, the court's concern about the Community's delay in providing the placement options arose from the effects of that delay on the children who had bonded with their foster family in the interim. And, as the dissent acknowledges, the court's additional observation that the change in placement motion was brought "two weeks prior to the termination [hearing]" was connected to its finding that "harm . . . would befall the children." Thus, we interpret that comment as a reference to the importance of placement stability for the children given the potentially unsettling effects of those upcoming proceedings.

¶15 This court has previously identified the level of a child's bonding with adults in an existing placement as a relevant factor in finding good cause to deviate from ICWA's placement preferences. *See In re Maricopa County Juv. Action No. A-25525*, 136 Ariz. 528, 534, 667 P.2d 228, 234 (App. 1983) (child's bonding with adoptive mother and conclusion that child's removal would cause "psychological damage" relevant in finding good cause to deviate from ICWA's adoptive placement preference); *see also Maricopa County No. JS-8287*, 171 Ariz. at 109, 828 P.2d at 1250 (considering strength of bond with foster parents as factor relevant to good cause in denying transfer of jurisdiction under ICWA). Moreover, Arizona's child welfare scheme implicitly acknowledges the importance of placement stability in the context of parental severance. *See* A.R.S. § 8-533(B)(8)(a) (ground for termination of parental rights if child in out-of-home placement for nine months and parent has neglected to remedy circumstances causing placement), (c) (ground for termination of parental rights if child in out-of-home placement for fifteen months and parent unable to remedy circumstances causing placement).

¶16 The juvenile court also itemized two other factors in declining to change the placement: that the proposed ICWA placement was in a different county than the children's current residence and that W. and G. were strangers to the children. Although we acknowledge that these were less weighty considerations which might not have, standing alone, justified a good cause finding, we cannot conclude that they were either irrelevant or improper factors in the context of the case. The court found the change in residence a factor only after receiving testimony that the resulting geographical distance would render it more

difficult for the children's parents to comply with any future parental visitation schedule. And, while we agree with the dissent that any foster care system must, by necessity, often place children with strangers, the court had other options here. Given that the court heard testimony that the children viewed their current foster parents as family, and that changing that placement would be emotionally detrimental to them, we cannot fault the court for considering the distress the children would experience in once again adapting to new foster parents they had never met.

¶17 Lastly, the dissent maintains that the juvenile court's findings regarding harm to the children were not sufficiently particularized to override ICWA's preference for an Indian placement. Specifically, the dissent faults the court for failing to make a specific finding that the harm was both unavoidable and of sufficient gravity to outweigh the preference. But the record before us demonstrates that the court (1) expressly ascertained and set forth the correct legal standard—that it should grant the placement unless it found good cause to deviate; (2) reviewed pertinent reports prepared by the case worker and heard live testimony from W. and G. and the case worker; (3) acknowledged the suitability of the proposed ICWA placement and the value of the link with the Community that placement would provide; and (4) itemized and articulated its reasons, as noted above, for nonetheless rejecting the proposed placement. We think it implicit from this record that the court found the potential harm to the children sufficiently grave to overcome the presumption in favor of the ICWA-compliant placement. The law requires nothing more. *See* 44 Fed. Reg. at 67,584 ("[T]he use of the term 'good cause' [in the Act] was designed to provide state courts

with flexibility in determining the disposition of a placement proceeding involving an Indian child.").

¶18 For these reasons, the juvenile court did not abuse its discretion in finding good cause for denying the motion to relocate Nathaniel and Natalie.

MOTION TO TRANSFER

¶19 ICWA provides for exclusive tribal jurisdiction in matters pertaining to the custody of Indian children living within the reservation, 25 U.S.C. § 1911(a), but in matters pertaining to children who do not live on the reservation, the Act provides for concurrent jurisdiction between tribal and state courts with a preference for tribal jurisdiction.[3] 25 U.S.C. § 1911(b). The latter subsection, entitled "Transfer of proceedings; declination by tribal court," specifically provides:

> In any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

Id.

¶20 As this court noted in *Maricopa County No. JS-8287*, 171 Ariz. at 107, 828 P.2d at 1248, "[b]ecause the Act does not define 'good cause to the contrary,' a state court has discretion whether to transfer a matter to tribal court or retain jurisdiction." Importantly,

[3]It appears to be undisputed that the children do not reside on the reservation.

the introduction to the BIA Guidelines also notes that "the legislative history of the Act states explicitly that the use of the term 'good cause' was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child." 44 Fed. Reg. at 67,584. "Our role when deciding jurisdictional issues under ICWA is to decide '*who* should make the custody determination concerning [the] child[]—not what the outcome of that determination should be.'" *Michael J.*, 198 Ariz. 154, ¶ 7, 7 P.3d at 962, *quoting Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 53 (1989) (alterations in *Michael J.*).

¶21 BIA Guideline C.1 states: "The request [to transfer] shall be made promptly after receiving notice of the proceeding." 44 Fed. Reg. at 67,590. The Commentary to Guideline C.1 further explains: "When a party who could have petitioned earlier waits until the case is almost complete to ask that it be transferred to another court and retried, good cause exists to deny the request." 44 Fed. Reg. at 67,590. In addition, BIA Guideline C.3(b)(i) provides: "Good cause not to transfer . . . may exist if . . . [t]he proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing." 44 Fed Reg. at 67,591.

¶22 The parents and the Community challenge the juvenile court's finding that the matter was at an advanced stage when Priscilla filed the transfer motion, arguing that the motion, therefore, was not untimely. The court noted "the coincidence" that Priscilla had waited until the permanency hearing in March 2009 to enroll the children in the Community, a full year after the dependency proceeding had started. Notably, Priscilla did not file the

motion to transfer until July 1, 2009, fifteen months after the dependency proceeding had begun, three months after the permanency hearing and the filing of the petition to terminate the parents' rights, two months after the children had been enrolled in the Community, and just weeks before the termination hearing was set to begin. *See In re Wayne R.N.*, 757 P.2d 1333, 1336 (N.M. Ct. App. 1988) (fact that parents filed motion to transfer six months after notice of termination proceeding weighed against transfer).

¶23 Moreover, the parents were not only notified of all hearings related to this matter, but they also were advised at the outset of the dependency proceeding that their parental rights might be terminated. *See In re Dependency of E.S.*, 964 P.2d 404, 411-12 (Wash. Ct. App. 1998) (motion to transfer filed on eve of termination, three months after tribe's intervention, delayed child's right to speedy resolution, particularly in light of fact that tribe had been notified of all proceedings); *see also In re Robert T.*, 246 Cal. Rptr. 168, 172 (Cal. Ct. App. 1988) (five-month delay between notice of termination hearing and filing transfer petition constituted good cause to deny transfer). In fact, as previously noted, Priscilla had suggested she might file a motion to transfer as early as April 2008, although she did not do so for another year.

¶24 Priscilla argues that she could not reasonably have been expected to file a motion to transfer while the Nation was looking for a placement for the children. However, she knew in November 2008 that the Nation had been unable to find a placement, yet she waited an additional three months to prompt the Community to re-intervene and an additional seven months to file the motion to transfer. She also contends, without legal or factual

support, that she could not have filed the motion to transfer until the children were in an ICWA-compliant home. We reject this unsupported argument, as did the juvenile court.

¶25 The parents and the Community further argue that the juvenile court improperly relied on the best interests of the children in finding good cause to deny the transfer petition. However, as previously noted, because the Act does not define "good cause," the juvenile court is left with considerable discretion to consider whether to transfer jurisdiction. *Maricopa County No. JS-8287*, 171 Ariz. at 107, 828 P.2d at 1248. Moreover, Division One previously ruled that "[a] trial court properly may consider an Indian child's best interest when deciding whether to transfer a custody proceeding to tribal court." *Id.* at 110, 828 P.2d at 1251; *see also Robert T.*, 246 Cal. Rptr. at 173 ("timeliness requirement reflects the Act's concern for the best interests of the Indian child," and timeliness should be considered on a case-by-case basis). In any event, the juvenile court's finding that the proceedings were at an advanced stage was sufficient to support its denial of the motion to transfer even without a best-interests analysis. *See Maricopa County No. JS-8287*, 171 Ariz. at 109-10, 828 P.2d at 1250-51. Nor is it clear that the juvenile court did, in fact, conduct a best-interests analysis distinct from its examination of the delay factors it necessarily had to consider to determine whether the proceedings were at an advanced stage. For all of these reasons, we conclude the juvenile court was well within its discretion when it denied the motion to transfer.

¶26 In conclusion, we find the juvenile court correctly denied the motion to transfer and thus affirm the court's July 29, 2009 ruling. We likewise affirm the court's July 16, 2009 ruling denying the motion for change of placement.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

H O W A R D, Chief Judge, dissenting.

¶27 I am compelled to dissent because the trial court did not make adequate findings to support its good-cause determination when deciding not to follow the ICWA placement preference. Congress has determined that it is in the best interests of Indian children and the tribes to place such children in Indian homes when possible. *See* 25 U.S.C. § 1902 (Congress intended for Indian children to be placed "in foster or adopted homes which will reflect the unique values of Indian culture"). It has also allowed the courts to deviate from that placement based on a determination of "good cause." 25 U.S.C. § 1915(a). But that good cause must be sufficient to overcome Congress's determination that the best interests of Indian children generally are served by placement in Indian homes. *See id.*

¶28 Here, as the majority notes, the trial court found three factors that it concluded constituted good cause: the ICWA placement was in a different county (Maricopa) than the children's current residence; W. and G. were strangers to the children; and the children were bonded with their current foster family, with whom they had lived for thirteen months. But it is not apparent how the difference in county has any bearing on the best interests of these children or could constitute good cause to deviate from the preference. That the prospective Indian placement couple were strangers to the children is similarly unavailing. Placement with strangers, while unfortunate, is often inherent in the foster care system. Congress must have considered that the preference would cause Indian children to be placed with Indians who were strangers, and it still enacted the preference. Therefore, this factor is not an appropriate consideration.

¶29 The final factor is that the children were bonded with their current foster family with whom they had lived for thirteen months. I agree that bonding of the children with the current placement can be one factor in a good-cause determination. *See In re Maricopa County Juv. Action No. A-25525*, 136 Ariz. 528, 534, 667 P.2d 228, 234 (App. 1983). But the good-cause determination must also take into account the preference for Indian placement and be of sufficient weight to overcome it. The question remains in this case whether this one factor is sufficient to outweigh the Congressional policy for ICWA placements.

¶30 The trial court stated that "timing is everything in this particular case." And it connected its finding that "harm . . . would befall the children" to its concern that the motion was "two weeks prior to the termination [hearing]." The court further noted that it

would have placed the children with the prospective placement "if [it] didn't think [it] was harming [them] in removing them [from their current home] at this point."

¶31 The trial court also found that the prospective Indian placement was appropriate and would ensure the link with the Indian community. In the face of such a finding, I believe the trial court would need to have found that moving the children would cause an unavoidable, particularized harm of sufficient gravity to overcome the ICWA preference for an Indian placement. Absent a particularized finding of what and how great that harm or damage to Nathaniel and Natalie might be, it is impossible to determine whether the court based its ruling on sufficient good cause to deviate from ICWA's placement preferences. The mere passage of time and the associated administrative inconvenience of "removing the children two weeks prior to the termination [hearing]" are not by themselves sufficient reasons to deviate from the Act. Although the children were bonded with their current placement, the record provides no reason to believe that they could not also bond with the prospective placement. And the social worker testified that the children could be moved into the prospective placement gradually to make the transition easier for them.

¶32 The majority relies in part on *In re Maricopa County Juvenile Action No. A-25525* in concluding that the children's bond with their foster placement was sufficient for the court to find good cause to deviate from the Act. But the child in that case had been in a prospective adoptive home for three years, and the trial court had found the child's removal would cause "psychological damage." *Id.* at 534, 667 P.2d at 234. That particularized finding of harm is significantly different than a generalized finding of best interests or that

the children were bonded. This is precisely the type of particularized finding, presumably based on an adequate record, that is lacking here.

¶33 The trial court considered two improper factors in making the best-interest determination. Its findings concerning the third, proper factor were tainted by a discussion of administrative inconvenience. And the court does not explain the gravity of the harm or whether it is avoidable. The court's findings do not justify a conclusion that this harm outweighs Congress's placement preference. Based on this record and these findings, I cannot vote to affirm. Therefore, I would vacate the trial court's order and remand.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge